

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1650

Cir. Ct. No. 2013TR8565

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COLUMBIA COUNTY,

PLAINTIFF-RESPONDENT,

V.

STEPHEN M. KOKESH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Columbia County:
DANIEL GEORGE, Judge. *Affirmed.*

¶1 KLOPPENBURG, P.J.¹ Stephen Kokesh appeals the judgment of conviction for operating while intoxicated first offense in violation of WIS. STAT. § 346.63(1)(a). Kokesh argues that the circuit court erred in denying his motion to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

suppress evidence because, according to Kokesh, the arresting officer did not have reasonable suspicion to conduct a traffic stop. I conclude that the traffic stop was supported by reasonable suspicion and, therefore, the circuit court did not err in denying the motion to suppress evidence. Accordingly, I affirm the judgment.

BACKGROUND

¶2 The facts relevant to the circumstances of the arrest are substantially undisputed. Deputy Chad Steinle testified at the motion hearing that at approximately 2:28 a.m. on a weekend morning, he was traveling eastbound on Highway 60 in Columbia County when he noticed a vehicle traveling westbound on the same highway. As the vehicle approached Deputy Steinle's location, Deputy Steinle saw "that the vehicle was completely straddling the white fog line." Deputy Steinle turned his squad car around, followed the vehicle, and observed the vehicle continuously "weaving within the westbound lane of traffic" for approximately four to five miles.

¶3 Deputy Steinle described Highway 60 as "straight, curvy, [and] hill[y]" but that there was no other traffic on the highway and there were no weather conditions or road obstacles to explain the vehicle's weaving pattern. After following the vehicle for approximately four to five miles, during which time the vehicle continued to weave "back and forth in the lane" and "traveled on or right of the fog line twice," Deputy Steinle activated his emergency lights on his squad car and conducted a traffic stop.

¶4 Kokesh filed a pretrial motion to suppress any evidence arising from the traffic stop, arguing that the traffic stop was unlawful because Deputy Steinle did not have reasonable suspicion that Kokesh was committing an offense. After an evidentiary hearing the circuit court denied Kokesh's motion and found that

based on the totality of the circumstances, Deputy Steinle had reasonable suspicion to conduct a traffic stop based on the following reasoning:

The officer at the time of the encounter with the defendant observed that he was completely straddling the fog line at the time they passed one another....

Over the course of the next four to five miles, he was following the defendant, observing him drifting from the fog line, to the center line, back and forth continuously over this course of time.

The officer testified that he observed the defendant touch or go over the fog line on a couple more occasions other than the time that he first observed the defendant when they met head-on.

Under the totality of the circumstances, considering the hour of the day and the type of driving behavior, although it was not in itself a violation of any traffic law, the continuous drifting back and forth in the defendant's lane of travel, together with the straddling of the fog line, the touching or going over the fog line, again on a couple of further occasions[,] provided the officer with reasonable suspicion that the defendant was operating potentially while impaired and justified the stop and further inquiry.

Kokesh was then found guilty of operating while intoxicated first offense.

DISCUSSION

¶5 Kokesh argues that the circuit court erred in denying his motion to suppress evidence obtained following the traffic stop, because Deputy Steinle did not have reasonable suspicion to conduct the traffic stop. As explained below, I conclude that the traffic stop was supported by reasonable suspicion and, therefore, the circuit court did not err in denying the motion to suppress evidence.

¶6 This court analyzes the denial of a suppression motion under a two-part standard of review: we uphold the circuit court's findings of fact unless they are clearly erroneous, but we independently review whether those facts warrant

suppression. *State v. Conner*, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267. “Whether there is probable cause or reasonable suspicion to stop a vehicle is a question of constitutional fact.” *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. In other words, the ultimate question of “whether the facts as found by the [circuit] court meet the constitutional standard” is reviewed de novo. *State v. Hindsley*, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48.

¶7 The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution offer protection against unreasonable searches and seizures.² “The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of the Fourth Amendment.” *Popke*, 317 Wis. 2d 118, ¶11 (quoted source omitted). Therefore, the “stop must not be unreasonable under the circumstances.” *Id.* A traffic stop is reasonable if supported by probable cause that a traffic violation has occurred or by reasonable suspicion that a violation has been or will be committed. *Id.*

¶8 The dispositive issue here is whether Deputy Steinle’s stop of Kokesh’s vehicle was supported by reasonable suspicion that Kokesh was driving while intoxicated. Our supreme court held in *State v. Post* that the determination

² The Fourth Amendment of the United States Constitution states, “The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause” Article I, Section 11 of the Wisconsin Constitution provides, “The right of the people to be secure in their persons ... against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause”

of whether a driver “weaving within a single lane gives rise to reasonable suspicion requires an examination of the totality of the circumstances.” 2007 WI 60, ¶27, 301 Wis. 2d 1, 733 N.W.2d 634. The *Post* court refused to adopt a bright-line rule that weaving within a single lane by itself gives rise to reasonable suspicion, but it also rejected the bright-line rule that weaving within a single lane must be “erratic, unsafe, or illegal to give rise to reasonable suspicion.” *Id.*, ¶26. Instead, the court required that the State “show[] that there were ‘specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant’ the intrusion of the stop.” *Id.*, ¶27 (quoted source omitted).

¶9 Turning to the case at hand, I conclude that the totality of the circumstances as found by the circuit court demonstrated that Deputy Steinle had reasonable suspicion to conduct the traffic stop. Deputy Steinle testified that Kokesh’s “vehicle was going right to left and weaving within the westbound lane of traffic” for approximately four to five miles. The *Post* court noted that other jurisdictions have considered prolonged weaving a factor supporting reasonable suspicion. *Post*, 301 Wis. 2d 1, ¶25. In addition, in this case, the prolonged weaving for four to five miles took place at around 2:28 a.m. on a weekend morning. The time of the incident taken together with the type of driving behavior here, including at least two occasions of touching or crossing the fog line along with prolonged weaving, provided Deputy Steinle with reasonable suspicion that the driver was operating while intoxicated. *See Popke*, 317 Wis. 2d 118, ¶27 (considering the fact that the incident took place at 1:30 a.m. to support a finding of reasonable suspicion under the totality of the circumstances).

¶10 Kokesh attempts to distinguish this case from *Post* and argues that “the facts in this case are far less suspicious.” In his brief in chief, Kokesh provides a table contrasting the facts in this case against those in *Post*, including

time of day, degree of weaving, frequency of weaving, distance travelled, width of the lane, width of the vehicle, measurement of the weaving within the lane, whether the vehicle touched the fog line, and the type of road the vehicle was traveling on. While this court appreciates Kokesh's efforts, there is not a mathematical equation whereby we can simply input numbers to receive an answer of yes or no to our inquiry of whether there was reasonable suspicion. Indeed, the *Post* court refused to do just that.

¶11 As stated above, given the totality of the circumstances in this case—the time being 2:28 a.m. on a weekend morning, the continuous weaving over a distance of four to five miles, and the multiple instances of touching or crossing over the fog line when there were no other vehicles or impediments on the road—I conclude that there was reasonable suspicion to support the traffic stop.

CONCLUSION

¶12 For the reasons set forth above, I reject Kokesh's argument that the circuit court erred in denying his motion to suppress evidence. Therefore, I affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

